IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0067
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
RENIE VARELA VALENCIA,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20052947

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 A jury found Renie Valencia guilty of burglary in the first degree and theft by control of $25,000 or more, both class two felonies. The court sentenced him to two presumptive, concurrent prison terms of 15.75 years. On appeal, Valencia challenges his convictions on the ground, *inter alia*, that the trial court erred when it refused Valencia's requested instruction regarding deoxyribonucleic acid (DNA) evidence found at the crime scene. For the reasons stated below, we affirm.

¶2 On January 10, 2005, David Dingley returned home from work to find his house "ransacked." The back gate was unlocked and open, the back door was open, and items were strewn about the yard and house. Dingley called his housemate, Cheryl Langdon, who had left the house earlier in the morning than he, to inquire whether she knew what had happened. Langdon called 9-1-1 and returned home. While they waited for police officers to arrive, Dingley and Langdon discovered many items were missing, including jewelry Langdon had inherited from her grandmother, several guns, tools, and clothing Langdon had purchased the day before from the Robinsons-May department store. Dingley and Langdon valued their loss in excess of $40,000.

¶3 After the police officers left, and while she was straightening her house, Langdon discovered a cigarette butt under a pile of her belongings in their bedroom. Neither Dingley nor Langdon smoked, nor did they have any guests in their home that day. Langdon retrieved the butt by putting her hand within a "ziploc" bag, picking up the butt with the bag and then pulling the bag inside out, without ever touching the butt with the skin of her

fingers. The next day, she took the bag containing the cigarette butt to the police. Not long after, the police department crime laboratory began testing the cigarette butt for DNA evidence.

¶4 A detective in the burglary unit of the Tucson Police Department became involved in the case after Langdon provided police with the cigarette butt. His interview with Langdon led him to Robinsons-May, where Langdon had returned to replace her clothing. The detective's investigation there led him to a "person of interest," Elizabeth Valencia. Her DNA did not match that left on the cigarette butt—the DNA on the butt belonged to an "unknown male."

¶5 The detective's investigation of Elizabeth Valencia's connection to the crime led him to appellant, Valencia. After obtaining a search warrant, the detective obtained a DNA sample from Valencia, which the police department's criminalist testified was a match to that on the cigarette butt. During Valencia's trial, both Dingley and Langdon testified they did not know Valencia and had not given him permission to enter their home.

¶6 At the close of the state's case, defense counsel moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., which the trial court denied. After closing arguments, Valencia asked the trial court to instruct the jury that they could not find Valencia guilty unless independent evidence demonstrated that the DNA evidence could only have been deposited at the time the crime was committed. The trial court denied Valencia's request, stating that the issue would be better covered by the instructions on

credibility and reasonable doubt. It also observed that the instruction likely would be "a comment on the evidence."

¶7 On appeal, Valencia argues the trial court erred in denying the instruction because it would not have been a judicial comment on the evidence, but rather a correct statement of the law. Absent an abuse of discretion, we will not reverse a trial court's decision to refuse a jury instruction. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

¶8 A trial court is not obligated to give a proposed jury instruction "when its substance is adequately covered by other instructions." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). "[T]he test is whether the instructions adequately set forth the law applicable to the case." *Id.* In determining whether an instruction adequately reflects the law, we view the instructions provided by the trial court in their entirety. *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994).

¶9 The state contends the trial court properly refused Valencia's proposed jury instruction because it was a misstatement of the law. We agree. The proposed instruction read:

> Unless it can be shown by independent evidence presented by the prosecution that the circumstances are such that DNA identified as the defendant's could have been impressed only at the time the crime was perpetrated, the presence of the defendant's DNA on an object found at the scene of a crime is not sufficient to establish his connection with the crime charged.

In general terms, Valencia's theory of the case was that the DNA evidence was insufficient to show that Valencia had committed the burglary. During closing arguments,

defense counsel specifically argued the jury could not find Valencia guilty unless they found he had smoked the cigarette inside the victims' bedroom during the time that

Dingley and Langdon were away from their house on the day of the crime. He further argued that the cigarette was not soiled by being "grounded out" in the dirt and there

was no evidence of the kind that one would expect to find if the perpetrator had put out the cigarette inside the house, such as markings in the kitchen sink or a

butt floating in the toilet.

¶10 In seeking the instruction, Valencia essentially asked the trial court to find, as a matter of law, that DNA evidence

identifying the perpetrator of a crime may only be considered if the state has eliminated all conceivable exculpatory inferences arising from that evidence.

See Ariz. Const. art. VI, § 27 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). We can find no Arizona case law

supporting that proposition. Nor does Valencia present any authority for his implicit contention that a lone piece of circumstantial evidence, however

inculpatory, can never constitute sufficient evidence of a defendant's guilt.[1]

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[1]Because the state did not present any significant evidence beyond the presence of Valencia's DNA on the butt, Valencia would have been entitled to a directed

To the contrary, the

verdict at the close of the state's case if his proposed instruction was a correct statement of law. Although Valencia did challenge the sufficiency of the evidence against him at the close of the state's case, a challenge rejected by the trial court, he has not done so on appeal.

court correctly instructed the jury that the law does not distinguish between circumstantial and direct evidence and that either may be sufficient to prove guilt beyond a

reasonable doubt.[2] *See State v. Stuard*, 176 Ariz. 589, 603-

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[2]The court instructed the jury to weigh the evidence presented and determine its importance, "regardless of whether it is direct or circumstantial."

04, 863 P.2d 881, 895-96 (1993).

¶11 The court also correctly instructed the jury that it could convict Valencia only if it found the evidence demonstrated his

guilt beyond a reasonable doubt. Because no law or logic supports the proposition that DNA evidence is insufficient to prove guilt unless all conceivable

exculpatory inferences have been eliminated, Valencia's proposed instruction, requiring the latter conclusion, was an incorrect statement of law. Because the jury, not

the court, decides the truth of facts testified to and the reasonable inferences to be drawn therefrom, *Jones v. Munn*, 140 Ariz. 216, 221, 681 P.2d 368, 373

(1984) ("Inferences to be derived from the evidence are within the sole province of the jury."), and because under Arizona law the jury could find Valencia guilty if it

placed sufficient weight on the DNA evidence, the proposed instruction was also an improper comment on the evidence. *See id.* (court improperly comments on

evidence when it "express[es] an opinion as to what the evidence shows or what it does not show").

¶12

Valencia next argues the trial court

violated his constitutional right to a jury trial when it found he had prior felony convictions that qualified him for enhanced sentences. He also contends the trial court violated

his right to be free from double jeopardy by imposing an enhanced sentence based on that finding because it was made after the court had dismissed the jury.

As Valencia acknowledges, both of these arguments have been presented to us in a previous case, and we have rejected them. *State v. Keith*, 211 Ariz. 436, ¶¶ 3, 7, 122

P.3d 229, 230, 231 (App. 2005). We again reject them for the reasons we articulated there.

¶13 We affirm the trial court's decision.

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PETER J. ECKERSTROM,
Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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P HILIP G. ESPINOSA, Judge